IN THE

# Supreme Court of the United States

OCTOBER TERM, 1920.

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No. 313.

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CHARLES F. HUNT, EXECUTOR OF THE ESTATE OF WILLIAM WEIGHEL, DECEASED, *Appellant*,

*vs.*

THE UNITED STATES, *Appellee*.

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APPEAL FROM THE COURT OF CLAIMS.

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## BRIEF FOR APPELLANT.

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### STATEMENT OF FACTS

This case comes before this Court upon appeal by claimant from a judgment of the Court of Claims in favor of the defendants and dismissing appellant's petition. The Court of Claims found that a cause of action against the defendants existed but that it did

not exist in claimant's decedent. The appeal, therefore, presents but one question, namely, whether there existed in appellant's decedent a right of action against the United States.

William Weighel, on January 17, 1895, entered into a contract with the United States to transport United States mail on Route No. 235001, at Chicago, Illinois, for a period of four years from July 1, 1895 (Finding I, Rec., p. 61). Under dates of November 14, 1895, May 12, 1896, February 27, 1897, and May 3, 1897, the Postmaster-General issued orders requiring Weighel to perform the extra service here sued for, claiming that it was covered by the contract (Finding IV, Rec., p. 63). Such service was not mentioned in the defendants' advertisement under which Weighel bid, and, at the time Weighel submitted his bid, was not being performed by mail contractors who were performing the service for which Weighel bid (Finding II, Rec., p. 62). Furthermore, the defendants expressly represented to Weighel before he submitted his bid that the successful bidder would not be required to perform it (Finding II, Rec., p. 62). Weighel protested that this service was not called for by his contract and served notice upon defendants that compensation therefor would be demanded. The service required by these orders entailed 523,276 trips and 25,550 days' work for one man, necessitating the employment of 24 men, 4 double vans and 7 single wagons to perform service previously performed by 4 drivers and 4 single wagons (Finding IV, Rec., p. 63). The Court of Claims has found that this service was of the fair and reasonable value of $52,327.60, no part of which has ever been paid by the defendants (Finding IV, Rec., p. 63; Opinion, Rec., p. 65). Weighel, under

date of February 6, 1895, which was prior to the commencement of the contract-term and prior to the service of said orders, employed Ezra J. Travis as subcontractor to perform the service covered by the contract between Weighel and the defendants, Weighel agreeing to pay him $70,000 per annum and Travis binding himself to Weighel in the sum of $100,000 to perform said service, liability for all fines and deductions imposed upon Weighel to be borne by Travis (Finding I, Rec., p. 62; subcontract, Rec., p. 24). In pursuance of the subcontract between Weighel and the subcontractor, the subcontractor performed the service covered by Weighel's contract with the defendants, and as a result of said orders performed also the above-described service required by the orders (Finding I, Rec., p. 62; Finding IV, Rec., p. 63). The defendants paid Weighel the entire $72,400 per annum called for by the contract between the defendants and Weighel, and Weighel paid his subcontractor the $70,000 per annum called for by the subcontract between Weighel and the subcontractor (Finding I, Rec., p. 62; subcontract, Rec., p. 24). The subcontract was entered into with the knowledge of the Postmaster-General. The subcontract was not filed with the Second Assistant Postmaster-General in accordance with the statute that defines the terms under which a subcontractor may acquire the right to be paid by the United States, and the subcontractor, under date of October 4, 1895, in writing, informed the Second Assistant Postmaster-General that his subcontract with Weighel "is not intended to be filed for recognition by the Department, or as a lien against the pay of the contractor" (Finding VI, Rec., p. 63). The Second Assistant Postmaster-General recognized that Travis

was the subcontractor under his subcontract with Weighel, but not a subcontractor to whom the United States could make payment for services, the statute not having been complied with, and all payments were made direct to Weighel and he in turn paid Travis (Finding VI, Rec., p. 63; Finding I, Rec., p. 62). After the expiration of the contract-term, the Second Assistant Postmaster-General wrote Travis that the sum of $55.50 "will be deducted from your pay as subcontractor on said route, in accordance with the terms of your subcontract." This deduction, however, if made, was made from the contractor's pay, as all payments by the defendants were made to the contractor and none to the subcontractor (Finding I, Rec., p. 62).

On April 18, 1901, claimant's decedent filed his petition herein in the Court of Claims. On August 6, 1907, the subcontractor filed a petition to be substituted as plaintiff, alleging that Weighel had become burdened by debts and judgments to large amounts and had died, and that the subcontractor was uncertain as to the course he might properly pursue (Finding VII, Rec., p. 63; Rec., p. 22, par. 14). Said petition was dismissed on demurrer (Rec., p. 32). Weighel's prior petition was amended by his executor, and upon the latter petition the cause was heard in the Court of Claims.

No appeal is taken from the finding by the Court of Claims that extra service was rendered for which no compensation has been paid by the United States, and that the value of such extra service is $52,327.60.

The Court of Claims has found, however, that, as a matter of law, the right of action for the recovery of the sum due for said extra service does not exist in

William Weighel, or in his personal representative (claimant), but existed in the subcontractor. Exception is taken to this determination by the Court of Claims and appeal is taken therefrom.

## ASSIGNMENT OF ERRORS.

(I) The court erred in dismissing claimant's petition.

(II) The court erred in finding, as a matter of law, that the right of action sued upon was not in claimant.

(III) The court erred upon the facts found in not entering judgment for claimant.

## ARGUMENT.

### I.

### THE RIGHT OF ACTION VESTED IN WEIGHEL AND REMAINED IN HIM UNTIL HIS DEATH AND NOW IS IN HIS PERSONAL REPRESENTATIVE (CLAIMANT).

William Weighel, while the contractor with the United States for the performance of mail service upon Route No. 235001 in the City of Chicago for the term from July 1, 1895, to June 30, 1899, received, as such contractor, orders from the defendants to perform the service here sued for (Finding I, Rec, pp. 61. 62; Finding IV, Rec., p. 63).

Each of said orders issued to Weighel contained the following language:

> "Require contractor to perfom service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of

his contract'' (Finding IV, Rec., p. 63; Rec., pp. 43, 46, 47).

Weighel protested that the service so ordered was not covered by the contract and that compensation therefore would be demanded (Finding IV, Rec., p. 63).

Compliance with said orders, if the service demanded thereby was not covered by Weighel's contract, raised an implied promise by the defendants to pay to Weighel the fair and reasonable value thereof.

The defendants expressly represented to Weighel when he bid for the contract that the bidder obtaining the contract would not be required to perform the service so ordered (Finding II, Rec., p. 62; Opinion, Rec., p. 65).

Numerous decisions by this Court have established that such a representation takes such service out of the terms of the contract, and upon performance thereof, vests a right of action for compensation therefor in the contractor.

*United States* vs. *U. N. & C. Stage Co.*, 199 U. S. 414, 424.
*Hollerbach* vs. *United States*, 233 U. S. 165.
*Christie* vs. *United States*, 237 U. S. 234.
*United States* vs. *Spearin*, 248 U. S. 132.
*United States* vs. *Atlantic Dredging Co.*, 253 U. S. 11.

The performance of said service entailed 523,276 trips and 25,550 days' work for one man, necessitating, during a period of approximately three and a-half years, the employment of 24 men, 4 double vans and

7 single wagons to perform service which had previously been performed by 4 drivers and 4 single wagons. (Finding IV, Rec., p. 63.)

The Court of Claims has held that the service so ordered was "of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract." (Rec., p. 65.)

That holding is clearly substantiated by the facts cited and, it is submitted, establishes an additional ground of recovery under the doctrine of

*United States* vs. *U. N. & C. Stage Co.*, 199 U. S. 414, 422, 423,

and the Court of Claims so held.

Weighel, before the commencement of his contract-term and before the orders referred to were issued, and with the knowledge of the defendants, employed Ezra J. Travis as subcontractor under a separate contract in which Weighel agreed to pay Travis $70,000 per annum to perform the service which Weighel was under contract to perform for the defendants. (Finding I, Rec., p. 62; Finding VI, Rec., p. 63.)

The Court of Claims has found that in pursuance of the subcontract between Weighel and the subcontractor, the subcontractor performed the service covered by Weighel's contract with the defendants, and that in pursuance of said orders the subcontractor performed also the above-described service required by the orders (Finding IV, Rec., p. 63).

It is axiomatic in law that performance by a subcontractor is performance by the contractor, in the same manner that performance by an agent or em-

ployee is performance by the principal or employer, and that the right of action based thereon vests solely in the contractor.

*United States* vs. *Driscoll*, 96 U. S. 421.
*Kellogg* vs. *United States*, 7 Wall. 361.
*Conti* vs. *Johnson et al.*, 91 Vt. 467, 472.

Furthermore, that the parties themselves, and also the subcontractor, adopted the rule announced in said cases, is shown by the fact that the defendants, throughout the contract-term, with knowledge that the service was being performed by the subcontractor, paid to the contractor (claimant's decedent) the entire contract-pay of $72,400 per annum, thereby conclusively demonstrating their acceptance of performance by the subcontractor as performance by the contractor. (Finding I, Rec., p. 62; Finding VI, Rec., p. 63.) As it is evident from the language of the orders above-quoted, that the defendants in ordering Weighel to perform the service sued for, "in accordance with the terms of his contract," considered the service so ordered as covered by Weighel's contract with them, they also accepted performance of such service by the subcontractor as performance by the contractor.

As the subcontract was never filed (Finding VI, Rec., p. 63), the subcontractor acquired no rights under the statute providing in certain cases for payment to a subcontractor by the defendants out of the contractor's pay. (Finding VI, Rec., p. 63.) Furthermore, the subcontractor expressly disaffirmed in writing to the defendants before the issuance of the orders in question any rights he could have acquired by complying with the statute. (Finding VI, Rec., p. 63.)

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1921

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No. 38

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CHARLES F. HUNT, Executor of the Estate of
William Weighel, Deceased, Appellant,

vs.

THE UNITED STATES, Appellee.

Appeal from the Court of Claims.

ADDENDA TO

APPELLANT'S BRIEF. --page 8

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NO RIGHT OF ACTION VESTED IN THE SUB-CONTRACTOR

See Richmond Railway & Electric Co. v. Harris, 32 S.E. 458;

Baker v. McMurry Contracting Company, 223 S.W. 45, 48;

Mott v. Wright et al, etc., 184 Pac.517;

Horne v. McRae, 53 So. C. 51, 30 S.E. 701.

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THE FACT THAT THE SUBCONTRACTOR HAS NOT BEEN PAID BY THE CONTRACTOR CANNOT DEPRIVE THE CONTRACTOR OF HIS RIGHT OF ACTION

See Mathesius v. Brooklyn Heights R. Co., 96 Fed. 792;

Dugue v. Levy, 120 Louisiana 370.

Although the defendants paid to Weighel his entire contract-pay of $72,400 per annum for the service called for by his contract with the defendants, which service was performed by his subcontractor, they have not paid to Weighel or to anyone else any compensation for the service rendered in pursuance of said orders, which service was also performed by the subcontractor under the claim by the defendants that it was covered by the contract and under protest by the contractor (claimant's decedent). (Finding I, Rec., p. 62; Finding III, Rec., p. 62; Finding VI, Rec., p. 63; Opinion, Rec., p. 65, 2nd par.)

The Court of Claims has found that the fair and reasonable value of the service sued for was $52,327.60.

It is respectfully submitted that, upon these facts, a right of action for $52,327.60 against the defendants became vested in William Weighel and, since his decease, is now vested in his personal representative (claimant), and that, upon the facts found by the Court of Claims, judgment should be entered in favor of the claimant against the defendants for the sum of $52,327.60

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THE APPELLANT BELIEVES THAT THE ARGUMENTS HEREINBEFORE SUBMITTED SUFFICIENTLY ESTABLISH HIS RIGHT OF ACTION AND RIGHT TO JUDGMENT. IN THE REMAINING PORTION OF THE BRIEF, HOWEVER, THOSE ARGUMENTS WILL BE AMPLIFIED TO THE EXTENT NECESSARY TO ANSWER POSSIBLE ARGUMENTS OF THE DEFENDANTS, AND CERTAIN ASPECTS OF THE OPINION OF THE LOWER COURT WILL BE DISCUSSED.

## II.

## THE SERVICE SUED FOR WAS NOT COVERED BY THE CONTRACT.

(*a*) *The Service Was Expressly Excluded by the Representations of the Defendants.*

The contract entered into between Weighel and the defendants under which the defendants claimed the extra service was required, provided, in the second paragraph, as follows:

> "Witnesseth, That whereas W. Weighel has been accepted as contractor for transporting the mails on Route No. 23501 * * *, under an advertisement issued by the Postmaster-General on the 15th day of September, 1894, for such service, which advertisement is hereby referred to, and made by such reference a part of this contract." * * * (Rec., p. 55).

This contract was entered into pursuant to a proposal which contained the following language:

> "This proposal is made after due inquiry into, and with full knowledge of, all particulars in reference to the service; and, also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby." (Rec., p. 49.)

The advertisement (Rec., p. 39, *et seq.*) referred to in the proposal and made by the contract a part thereof, contains the following:

> "1. The foregoing schedules show the service, August 15, 1894, as near as can be stated. Bidders must inform themselves of the amount and

character of the service that will be required during the next contract term."

"27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to apply to the Postmaster at the city where the service is to be performed."

It should be noted that the proposal used by the bidder is prescribed as to form and contents by the defendants.

The Court of Claims has made the following Finding of Fact:

"II. At the time the plaintiff's decedent bid on this route no mail service in the city of Chicago was being performed to and from the street cars by contractors who were performing the same mail service which was bid for by the plaintiff's decedent, nor did the proposal of the defendants for mail service on this route mention service to and from street cars, although the proposal to bidders published by the defendants for the period beginning July 1, 1899, did mention specifically electric and cable cars. The plaintiff's decedent, through his agent, was informed by the postmaster at Chicago, who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service on route 235001 for the period set out in Finding I would not be required to perform mail service to and from street cars" (Rec., p. 62).

Weighel's action was taken under the instructions of the defendants in the advertisement issued by them

and the information so secured from the defendants was, under the terms of the contract entered into between Weighel and the defendants, made a part of such contract.

The direction by the defendants to bidders to apply to the Postmaster at Chicago for information relative to the route and the supplying of information to Weighel places the claimant in the same position as was the claimant in the case of

*Hollerbach* vs. *United States, supra.*

In that case specifications were furnished to the claimant showing the quantity of work that would be required under the contract, and later it was found that the work required under the contract was much greater than stated in the specifications shown to claimant. This Court held that such specifications were a part of the contract and that the claimant could recover for the extra work done, the defendants having represented that the work contracted for was that described in the specifications. In the present case Weighel was furnished by the Postmaster at Chicago with specifications (verbal) showing the quantity of work that would be required under his contract and expressly limiting the work that would be required. After the execution of the contract, work which the Postmaster at Chicago had expressly stated would not be included within the work required under the contract, was demanded of Weighel, and was furnished by him under protest.

The parallel between the two cases is exact, and the same parallel exists between the present case and the case of

*Christie* vs. *United States, supra,*

where the Court held, on page 242, as follows:

> "It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive."

See also *United States* vs. *Spearin, supra; United States* vs. *Atlantic Dredging Co., supra.*

In the *Utah, Nevada & California Stage Co.* case, which involved a form of advertisement for mail service apparently identical with the one in this case (see Rec., p. 38 *et seq.*), the representation by the defendants, upon which this Court allowed a recovery, was that there were two elevated stations to be served, while as a matter of fact there were four, and this Court said:

> "* * * It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the government, in its advertisement, had positively stated the number of stations at two. The contractor had a right to presume that the government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the government agents, and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for government service, that the general statement that the contractor must investigate for himself, and of

> nonresponsibility for mistakes, would require an independent investigation of a fact which the government had left in no doubt. We think the court of claims correctly allowed this item'' (199 U. S., 414, 424, 425).

In the case at bar, the representation was even stronger for, in addition to its being upon a subject "peculiarly within the knowledge of the government agents," it was a "positive" and "unequivocal" statement that the service would not be required.

All of these cases and the case now under discussion differ from the case of

*Simpson* vs. *United States*, 172 U. S., 372,

in that in the Simpson case all previous negotiations of the parties were merged in the final contract executed between Simpson and the United States, whereas in the case above cited and the present case the contracts entered into between the claimants and the defendants made the advertisements and specifications of the defendants part of the contract.

It must therefore be apparent that, in the case at bar, the service required of claimant's decedent and here sued for was expressly excluded from the obligation assumed by him under his contract with the defendants.

(b) *The Great Burdens and Duplication of Service, with the Large Increase in Expense, Imposed Upon the Contractor, which Could Not Be Foreseen by Him, Excluded the Service from the Contract Obligation Assumed by Claimant's Decedent, under the Doctrine of the Utah, Nevada & California Stage Co. Case.*

In its Findings of Fact the Court of Claims has found that

> "* * * As a result of these orders the subcontractor had to make to and from street cars 523,276 trips. * * * The service required by the aforesaid orders entailed 25,550 days' work for one man; and after the service required by said orders began the subcontractor was obliged to employ 24 men, 4 double vans, and 7 single wagons to perform the service, which had been previously performed by 4 drivers and 4 single wagons" (Finding IV, Rec., p. 63).

In its opinion the Court of Claims states (Rec., p. 65):

> "* * * The Government contends that the Postmaster General under the authority conferred upon him by the contractor in this case had a right to require the contractor to render new or additional mail messenger or transfer service and that the trips to and from street cars was such new and additional service (as) was provided for in the contract. We do not think so. The service required was of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract.
>
> "We think this case is governed by the principles laid down by the Supreme Court of the United States in the case of United States vs. Stage Company, 199 U. S., 414, 422, 423, * * *"

That case is too well known to this Court and has been too widely cited with approval in other cases to require discussion.

The above facts are believed to establish conclusively a situation to which the doctrine of the *Utah, Nevada & California Stage Co.* case is peculiarly ap-

plicable and to justify the holding of the Court of Claims that the service demanded of the contractor in this case and here sued for was not properly required under his contract.

(c) *Slavens and Proffit Cases Not Applicable.*

The defendants in the court below claimed that this case is controlled by the *Slavens case* (38 Ct. cl. 576; 196 U. S., 229) and the *Proffit* case (42 Ct. cl. 248). Such a contention is sufficiently answered by the following statement showing some of the distinctions between those cases and the case at bar:

| *The Proffit and Slavens Cases* | *This Case* |
|---|---|
| (a) In the Proffit case, the advertisement specified street car service. | (a) In this case, the advertisement did not mention street car service. |
| (b) In the Slavens and Proffit cases, there was no representation to bidders that the contract would not cover such service. | (b) In this case, the defendants expressly represented to bidders that the service sued for would not be required under the contract. |
| (c) In the Slavens case, there was no abnormal increase in the expense of performing the service, but on the contrary there was such an enormous reduction in expense that the defendants took advantage of the provision of the contract enabling them to discontinue it. | (c) In this case, the service occasioned a great increase of expense due to the necessity of employing, for approximately 3½ years, 24 men and 4 double vans and 7 single wagons to perform service that had previously been performed by 4 drivers and 4 single wagons. |

| | |
|---|---|
| (d) In neither the Slavens nor the Proffit cases was there an abnormal duplication of service. In the Slavens case, the service sued for was merely substituted for service previously performed under the contract. | (d) In this case, there was an abnormal duplication of service, the service to and from street cars being in addition to the wagon service previously and thereafter performed under the contract. |
| (e) In the Slavens case, the defendants discontinued the contract with the payment of one month's extra pay and readvertised, thus showing that the change in the method of performing the service had resulted in a substantial saving and that the defendants expected through a new contract to benefit thereby. | (e) In this case, the defendants did not discontinue the contract and readvertise as they did in the Slavens case and as they surely would have done if the new method of performing the service had effected a saving. |
| (f) In the Proffit case, the contractor sued largely for the loss of profit occasioned by the discontinuance, thus conclusively showing that the service sued for caused him no loss. | (f) In this case, the suit is for the value of the service rendered which the Court of Claims has found to be $52,327.60. |

It thus conclusively appears that on the facts, the opinions in the Slavens and the Proffit cases are not applicable.

## III.

## TRAVIS ACQUIRED NO RIGHT OF ACTION AGAINST THE DEFENDANTS FOR COMPENSATION FOR SERVICE RENDERED.

The lower court in its finding of law determined that the right of action vested in Travis without specifically showing the basis for its finding. Travis could have acquired rights against the defendants only in the following ways:

1. *By express contract with the defendants.* The defendants do not claim, and there is no finding of fact that supports a claim that an express contract was entered into between Travis and the defendants for any service whatever.

2. *Under certain circumstances which would imply a contract between Travis and the defendants.* The defendants had the right to select the person who should perform the service and to whom they would be liable for compensation, if any were due.

*Arkansas Smelting Co.* vs. *Belden Mining Co.*, 127 U. S., 379, 387.

This right they exercised by requesting Weighel to perform the service. This is one of those cases where the defendants would have required the service to be performed by Weighel and by no one else, and is not one of those cases where the performance of the service was of main importance and the person who performed it was of minor importance. A contract existed between Weighel and the defendants at the time the defendants requested such service, and the defend-

ants claims that such service was covered by the contract. The request for such service contained the following:

> "Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of the contract." (Finding IV, Rec., p. 63; Rec., pp. 43, 46, 47.) (After the above there followed a statement of the service required.)

Under these facts the defendants would have requested the performance of the service from no other person than Weighel and would have accepted such service from no one but Weighel or those representing him. It is a *sine qua non* in all actions to recover for services upon implied contract that the person rendering them must have intended at the time of performance that the person charged would make compensation therefor.

*Elliott on Contracts*, Vol. 2, p. 609, Sec. 1365.
*Coleman* v. *United States*, 152 U. S., 96.

That Travis at no time intended to hold the defendants liable for services rendered by him is apparent from the notice served by him upon the defendants, which, in effect, stated that he desired no recognition as subcontractor and that he expected to receive from them no compensation for his services, but would look to Weighel, the contractor, for compensation (Finding VI, Rec., p. 63), and by the further fact that he made no claim against the defendants for such services for a period of more than six years after the rendition of the last of such services, although during this time Weighel had instituted suit against the defendants for compensation for such services.

Inasmuch as neither the defendants nor Travis at the time of the rendition of the service expected or intended to enter into contract relations with each other regarding them, but on the contrary, each expected to enter into contract relations with Weighel regarding such service, it follows that Travis acquired no rights against the defendants.

*Harley* vs. *United States*, 198 U. S., 229.

3. *By novation.* The facts in this case do not show a novation, because the contract between Weighel and the defendants was never cancelled and his bond remained in full force during the term of the contract. The Court of Claims states (Finding I, Rec., p. 62) that the subcontract relieved Weighel of "the labor and responsibility of his contract," thus showing novation. It is apparent that the lower court inadvertently used the word "responsibility." The defendants have by statute expressly provided the only manner in which Weighel could have been released from his responsibility by entering into a subcontract, which is the only fact upon which novation could be based in this case. The statute reads in part as follows:

> "* * * Whenever any contractor or subcontractor shall sublet his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster General *may*, whenever he shall deem it for the good of the service, *declare the original contract at an end, and enter into a contract with the last subcontractor*, without advertising, to perform the service on the terms at which the last subcontractor agreed with the original contractor or former subcontractor to perform the same: *Provided, That such last subcontractor*

> *shall enter into a good and sufficient bond and that the original contractor shall not be released from his contract until a good and sufficient bond has been made by such last subcontractor and accepted by the Post Office Department.*"
>
> (Act May 4, 1882, Sec. 1, 22 Stat. L. 53; italics ours.)

But there is not a single fact in the Findings showing, and it is not claimed by the defendants that Travis ever did file a bond in favor of the United States, or enter into such a contract with the United States, or that the Postmaster General ever declared the original contract between Weighel and the United States at an end, or that Weighel ever was released from his liability to the United States. That Weighel at all times remained liable under his contract with the United States is still further shown by the following quotation from Sec. 792 of the Postal Laws and Regulations of the year 1893, which were in effect during the term of Weighel's contract:

> "Neither the permission to sublet, nor the recognition of the subcontract made in pursuance thereof, shall be construed as releasing the contractor from any of the obligations of his contract with the United States."

It is apparent that the lower court erred in its conclusion that the execution of the subcontract released Weighel from his responsibility to the defendants or in any wise constituted or effected a novation between Weighel and the defendants and Travis.

4. *By assignment to Travis from Weighel.* Sec. 3963 of the Revised Statutes of the United States prohibits

the assignment of mail transportation contracts and makes such assignments null and void. Sec. 3477 of the Revised Statutes prohibits the assignment of any claim against the United States prior to the issuing of a warrant for the sum covered by such claim. It therefore follows that Travis could have acquired no rights by assignment from Weighel either prior to the rendition of service or subsequently thereto.

5. *By a compliance with Sec. 1, 22 Stat. L. 53.* A compliance with this statute required that the subcontractor file with the Second Assistant Postmaster General a copy of the subcontract. This Travis has not done, and hence he acquired no right under this statute. See Appendix, p. 30.

6. *By a compliance with Sec. 3, 20 Stat. L. 62.* Under this statute Travis, by filing his subcontract with the Second Assistant Postmaster General, would have received from the defendants his proportion of any pay due the contractor, in accordance with the terms of his subcontract. A copy of the subcontract was not filed with the Second Assistant Postmaster General, and hence Travis acquired no rights under this statute. See Appendix, p. 30.

The facts as found show that the relation of contractor and subcontractor existed between Weighel and Travis during the performance of the service in controversy and that the lower court based its conclusion that the subcontractor Travis had a right of action against the defendants partly upon the fact that the officials of the Post Office Department had recognized Travis as subcontractor (Finding VI, Rec., p. 63).

It is a fundamental principle of public law clearly

recognized by a long series of decisions of this Court that no suit can be maintained against the United States in any Court without express authority of Congress.

*Stanley* vs. *Schwalby*, 162 U. S., 255, 269, 270.

The United States has prescribed the conditions upon which a subcontractor can acquire rights against them for services rendered under a subcontract. These conditions having been prescribed by statute, it is incumbent upon the subcontractor to comply with them in order that he may bring suit against the United States. In the present case the subcontractor did not comply with the statutes under which he might have instituted suit and hence has no standing in Court whatever. Where the United States has prescribed the taking of certain steps in order that suit may be instituted against them, this Court has many times held that a failure to follow the statutory requirements, although such requirements are purely formal, deprives the person so failing to comply, of the right of action he otherwise would have. The last expression of this Court on this subject is as follows:

> "Men must turn square corners when they deal with the Government. If it attaches purely formal conditions to its consent to be sued, those conditions must be complied with."
>
> *Rock Island, Arkansas & Louisiana R. R. Co.* vs. *The United States*. Adv. Ops. Oct. term, 1920, pp. 66, 67.

The lower Court found that the Post Office Department recognized the subcontractor as a subcontractor, and at the same time found that the subcontract was

not filed as required by Section 3, 20 Stat. L., 62. From the first finding the lower Court apparently concluded that the officials of the Post Office Department could, by recognizing a subcontractor, confer upon him the right to sue the United States for his pay, although the statute requiring the filing of the subcontract had not been complied with.

> "Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the Court in a suit brought against their officers."
>
> *Stanley* vs. *Schwalby, supra,*
> *Case* vs. *Terrell,* 78 U. S., 199, 202,
> *Carr* vs. *The United States,* 98 U. S., 433, 438,
> *United States* vs. *Lee,* 106 U. S., 196, 205.

If neither the Secretary of War nor the Attorney General nor their subordinates could waive statutory provisions relative to suits against the United States, then neither the Postmaster General nor his subordinates could, by recognizing a subcontractor, relieve him of the necessity of complying with the statutory requirement that he file his subcontract with the Second Assistant Postmaster General before he can acquire rights against defendants.

Whatever may be the sense in which the word "recognized" may be used by the Post Office Department, it is clear that in this case it can have no legal significance and can have been used by the lower Court (Finding VI, Rec., p. 63), only in the sense of "acknowledged as subcontractor" and, therefore, "per-

mitted'' by the Department to perform the service, but it could not have been used in the sense that any rights were thereby acquired by the subcontractor which could in any way affect the contractor's right to be paid for the service here performed.

## IV.

## THE PETITION FILED IN THE COURT OF CLAIMS BY THE SUBCONTRACTOR HAS NO BEARING HEREIN.

The petition of Travis to be substituted for Weighel as claimant herein, which was filed August 6, 1907, in no wise added to or changed the facts or in any way affected, or could affect, the rights of Weighel, or his personal representative against the defendants. The question being considered is the rights of Weighel against the defendants, not those of Travis. Weighel's petition was timely filed in the Court of Claims and his right to recover, under this petition, cannot be minimized or destroyed by the subsequently filing of a similar petition by Travis.

## V.

## WEIGHEL AND HIS REPRESENTATIVE, SINCE THE PERFORMANCE OF THE SERVICE, HAVE CONTINUOUSLY ASSERTED WEIGHEL'S RIGHT TO COMPENSATION.

The statement in the Finding of Law in the lower Court that neither Weighel nor his representative has claimed that Weighel performed the extra service, is inaccurate. His protest against the performance

and his notice that compensation would be demanded therefor (Finding IV, Rec., p. 63), and the claim made in paragraph 12 of his petition in the Court of Claims (Rec., p. 5), and the corresponding claim in paragraph XII of the petition of his personal representative (Rec., p. 37), clearly demonstrated that Weighel at the time of the performance of the service, and thereafter, continuously, to the time of his death, claimed that he performed the extra service and was entitled to compensation therefor, and that his personal representative is now making the same claim.

## VI.

## THE OPINION OF THE LOWER COURT.

The error of the lower Court arose:

1. Because it was assumed that the officers of the defendants, in this case the Post Office Department, could by recognizing Travis as a subcontractor under Weighel, the principal contractor, thereby confer upon Travis' rights against the United States. The statutes provided the method by which Travis could secure rights under his subcontract which would be recognized by the defendants, and no other method could be followed which would confer rights upon him.

2. Because it assumed that the defendants became liable to Travis for the extra service, because the service was performed by him, or those employed by him, and not by Weighel, and overlooked the fact that Travis was employed by Weighel to perform all service demanded by the Post Office Department in connection with the contract, and hence the service was in

fact performed by Weighel and the defendants became indebted to him therefor.

3. Because it assumed that inasmuch as Travis incurred the expense of the extra service performed under his contract with Weighel, that, therefore, Travis had a right of action against the defendants who received the benefit of the service under their contract with Weighel, and that Weighel had no interest in the subject-matter of the suit, overlooking the fact that Weighel was responsible to Travis for compensation for the extra service rendered by Travis to Weighel under his contract with Weighel. That Travis expects in turn to be paid by the estate of William Weighel is beyond question, but this expectation on his part does not give him a suable interest in debts due the estate.The fallacy of the reasoning is apparent, not only from the cases heretofore cited, but also because under it, Sec. 3, 20 Stat. L., 62, would be nullified and a subcontractor could make a claim against the Government without complying with its terms.

## CONCLUSION.

The facts found show: (1) A contract between Weighel and the defendants; (2) a subcontract between Weighel and Travis; (3) a non-filing of the subcontract with the Post Office Department as provided by statute; (4) extra service rendered upon request made therefor by the defendants upon Weighel; (5) a protest by Weighel against the performance of such service as not coming within the terms of the contract between him and the defendants, and notice that extra compensation would be demanded therefor; (6) a clear

representation by defendants prior to the execution of the contract that the service sued for would not be required under the terms of the contract; (7) the actual performance of such service by Weighel through his subcontractor; (8) nonpayment of compensation by defendants for the performance of such service.

Under these facts the right of action was in Weighel, and is now in claimant, and Travis had no interest therein as against defendants. The suit was properly instituted in the name of Weighel, and upon his death his personal representative was properly substituted. A suit in the name of Weighel for the benefit of Travis would have been improper, and, moreover, if the suit could have been maintained in the name of Weighel for the benefit of Travis, it could, under the common law, and under a great majority of the codes, have been maintained in the name of Weighel alone. (See 30 Cyc., 77, 78 and cases cited.)

The rights of a party having an interest in the subject-matter of litigation, arising out of contract relations existing between him and the plaintiff, is discussed in the case of *Cole* vs. *Ralph*, 252 U. S., 286, 291, 292. In that case one Forman had an interest in the claim in litigation, under a contract between him and the plaintiffs. The claim arose out of conflicting mining locations, and he had not joined in filing the adverse claim, or in bringing the suit. The lower Court, upon motion, admitted him as a party plaintiff. This Court held:

> "We think his interest was not such as to make him an essential party to the adverse claim, or to the suit, and yet was such as to make him an admissible party to either." (252 U. S. 291, 292).

If Forman, who had a contract giving him "a real interest" in the above suit was not a necessary party to that suit, it is difficult to see in what way Travis, under his contract with Weighel, would be a necessary party in the present suit.

The judgment of the lower Court should be reversed.

Respectfully submitted,

A. R. SERVEN,
BURT E. BARLOW,
A. C. TRAVIS.

## APPENDIX:

### Sub-Letting Mail Transportation Contracts.

"Sec. 2. Hereafter no sub-letting or transfer of any mail contracts shall be permitted without the consent in writing of the Postmaster General; and whenever it shall come to the knowledge of the Postmaster General that any contractor has sub-let or transferred his contract, except with the consent of the Postmaster General as aforesaid, the same shall be considered as violated and the service may be again advertised as herein provided for; and the contractor and his securities shall be liable on their bond to the United States for any damage resulting to the United States in the premises." (20 Stat. L., 62.)

### Right of Subcontractor Upon Filing Subcontract.

"Sec. 3. Hereafter, when any person or persons being under contract with the Government of the United States for carrying the mails, shall lawfully sub-let any such contract, or lawfully employ any other person or persons to perform the service by such contractor as agreed to be performed, or any part thereof, he or they shall file in the office of the Second Assistant Postmaster General a copy of his or their contract and thereupon it shall be the duty of the Second Assistant Postmaster General to notify the Auditor of the Treasury for the Post Office Department of the fact of the filing in his office of such contract. Said notice shall embrace the name or names of the original contractor or contractors, the number of the route or routes, the name or names of the subcontractor or subcontractors, and the amount agreed to be paid to the subcontractor

or subcontractors. And upon the receipt of said notice by the Auditor of the Treasury for the Post Office Department, it shall be his duty to retain, out of the amount due the original contractor or contractors the amount stated in said notice as agreed to be paid to the subcontractor or subcontractors, and shall pay said amount, upon the certificate of the Second Assistant Postmaster General, to the subcontractor or subcontractors, under the same rules and regulations now governing the payments made to the original contractors: PROVIDED, That upon satisfactory evidence that the original contractor or contractors have paid off and discharged the amount due under his or their contract to the subcontractor or subcontractors, it shall be the duty of the Second Assistant Postmaser General to certify such fact to the Auditor of the Treasury for the Post Office Department; an(d) thereupon said Auditor shall settle with the original contractor or contractors, under the same rules as are now provided by law for such settlements." (20 Stat. L., 62).

PROVISIONS AS TO SUB-LETTING CONTRACTS AND RIGHTS OF SUBCONTRACTORS UNDER CHAP. 116, OF 22 STAT. L., 53.

"That whenever any contractor or subcontractor shall sub-let his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster General may, whenever he shall deem it for the good of the service, declare the original contract at an end, and enter into a contract with the last subcontractor, without advertising, to perform the service on the terms at which the last subcontractor agreed with the

original contractor or former subcontractor to perform the same: *Provided,* That such last subcontractor shall enter into a good and sufficient bond and that the original contractor shall not be released from his contract until a good and sufficient bond has been made by such last subcontractor and accepted by the Post Office Department: *Provided, further,* That when a contract hereafter made is declared void on account of its having been sub-let, the contractor shall not be entitled to one month's extra pay as provided for by law: *And provided further,* That if any person shall hereafter perform any service for any contractor or subcontractor in carrying the mail, he shall, upon filing in the department his contract for such service, and satisfactory evidence of its performance thereafter, have a lien on any money due such contractor or subcontractor for such service to the amount of the same; and if such contractor or subcontractor shall fail to pay the party or parties who have performed service as aforesaid the amount due for such service within two months after the expiration of the quarter in which such service shall have been performed, the Postmaster General may cause the amount to be paid said party or parties and charge to the contractor, provided that such payment shall not in any case exceed the rate of pay per annum of the contractor or subcontractor: *And provided further,* That where any person, corporation, or partnership shall have contracts for the performance of mail service upon more than one route, and any failure to perform the service according to contract on any one or more of such routes shall occur, no payment shall be made for service on any of the routes under contract with such person, corporation,

or partnership until such failure has been removed and all penalties therefor fully satisfied."

MAIL CONTRACTS NOT ASSIGNABLE.

"Sec. 3963. No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void." (R. S.)

ASSIGNMENTS OF CLAIMS WHEN VOID.

"Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same." (R. S.)

# CONTENTS.

# In the Supreme Court of the United States

OCTOBER TERM, 1920.

CHARLES F. HUNT, EXECUTOR OF THE ESTATE OF WILLIAM WEIGHEL, DECEASED, appellant,
*v.*
THE UNITED STATES.
No. 313.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES

### STATEMENT.

This case comes on appeal by Hunt, executor of the estate of William Weighel, deceased, from the judgment of the Court of Claims dismissing his petition on the ground that Weighel had no interest in the subject matter of the suit and therefore his executor can not maintain it.

On September 15, 1894, the Postmaster General issued an advertisement inviting proposals for the carriage of the mails in covered regulation wagons for the term from July 1, 1895, to June 30, 1899, in Chicago, Illinois, among other cities. (R. pp. 6, 38; Finding of Fact I, R. p. 61.) The advertisement provided for the performance of mail messenger, transfer, and mail station service between the post

offices and railroad stations, between the post offices and steamboat landings, between the post offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations; or between the several railroad stations, steamboat landings, and mail stations then established or that might thereafter be established, whether caused by the establishment of new or by change of site of existing post offices, railroad stations, steamboat landings, or mail stations within said city, or caused by the alteration of the routes made necessary for any other reason. (R. pp. 7, 39.) Attached to said instructions to bidders was a schedule setting forth the existing mail messenger service, transfer service, and mail station service, and probable and additional service. (R. p. 39.) Said schedule included service between the general post office and mail stations, among other services. (R. p. 126.) While a statement of probable additional service was included it was said that it would not limit the liability of the contractor to perform all service that might be necessary, without additional pay. (R. p. 39.)

William Weighel submitted a proposal for the performance of the service in Chicago in accordance with the advertisement for the sum of $72,400 per annum, which proposal was accepted by the Postmaster General and on January 17, 1895, Weighel and the defendants entered into a contract in writing for the performance of said service. (Finding I, R. pp. 61, 62; contract, R. pp. 55, et. seq.) By the terms of said contract the provisions of the ad-

vertisement and instructions to bidders were made a part thereof and the bidder contracted to carry all the mails in accordance therewith, and to perform all new or additional or changed mail messenger, transfer, and mail station service that the Postmaster General might order during the contract term, without additional compensation, whether caused by a change of location of post office, stations, landing, or the establishment of others than those existing at the date thereof, or rendered necessary in the judgment of the Postmaster General for any cause. It was further agreed thereby that the Postmaster General might change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon without change of pay. (R. pp. 57, 58.)

On February 6, 1895, before the beginning of the contract term, Weighel, the contractor, entered into a subcontract with Ezra J. Travis by which Travis agreed for the sum of $70,000 per annum to carry the mails on the route in question, relieving Weighel of the labor of his contract. Travis bound himself in the sum of $100,000 to Weighel to assume all liability for fines and deductions which might be imposed against Weighel. (Finding I, R. pp. 61, 62; subcontract, R. pp. 23, et. seq.)

Weighel had the permission of the Postmaster General to enter into the subcontract and Travis was recognized by the Post Office Department as subcontractor, but no copy of the subcontract was filed with the Postmaster General under the provision

of law giving the subcontractor a lien upon the pay of the contractor by so doing, and they notified the Postmaster General that the subcontract was not intended to be filed as a lien against such pay. The department, however, recognized the subcontractor in the actual conduct of the service. (Finding VI, R. p. 63, R. p. 19.)

After the beginning of the service mails were authorized to be transported on certain electric lines in the city of Chicago and orders were issued requiring the contractor for the wagon service to perform service between such lines and certain contiguous postal stations named in the advertisement. (Finding IV, R. p. 63; R. pp. 43–47, incl.) Requests were made upon the contractor, Weighel, and the subcontractor, Travis, to perform this service. (R. pp. 43, et seq.) Both Weighel, contractor, and Travis, subcontractor, protested by letter of September 1, 1896, to the Second Assistant Postmaster General, requesting pay for the service performed and requesting that provision be made for payment for future service. (R. p. 20.)

The subcontractor, Travis, performed the service described in the advertisement and contract, which is not in dispute here, and has received full payment therefor. (Finding III, p. 62.) He also performed all the service required by the orders in question, payment for which this suit was brought, and paid all the expense thereof, and has not been paid additionally therefor. (Finding of Fact IV, R. p. 63, Op. R. pp. 65, 66.)

PROCEEDINGS.

On April 18, 1901, the original petition was filed, purporting to be that of Weighel, claiming pay for the service covered by the orders in question. (R. p. 1.) No further steps were taken so far as the records show until August 6, 1907, when permission of court was obtained by claimant's attorney to file an amended petition in the name of Travis, which petition was filed.

Thereafter on February 13, 1912, claimant was granted leave of court to withdraw the amended petition and to file an amended substitute petition. This substituted petition for the amended petition filed August 6, 1907, was filed in the name of Travis, claimant, February 13, 1912. (R. pp. 13, 14.)

The defendants demurred to both the original petition and the substitute to the amended petition, and the Court of Claims sustained the demurrer to the Travis petition because of the statute of limitations and overruled it as to the original or Weighel petition. (R. pp. 29 et seq.) No appeal was taken from the judgment of the court dismissing the Travis petition.

Thereafter, on June 11, 1918, the appellant herein, Hunt, executor of the estate of Weighel, deceased, substituted claimant, filed an amended petition (R. pp. 32 et seq.), setting forth the same cause of action theretofore presented in the original petition. The Court of Claims decided, however, that such cause of action as arose was in Travis, whose petition

had been dismissed because of the statute of limitations, and not in Weighel, and therefore gave judgment that Weighel's executor, the appellant herein, is not entitled to recover and that his petition be dismissed. It is from this judgment dismissing Hunt's petition that the appeal to this court is prosecuted.

## ARGUMENT.

### I.

**The right of action, if any existed, was not in Weighel.**

Ordinarily performance by the subcontractor is performance by the contractor so far as the other party to the contract is concerned. The subcontractor is not a party to the prime contract, suit upon which must be brought by the contractor party to it, and his liability to or settlement with the subcontractor is no concern of the defendant, because the suit is not brought for the benefit of the subcontractor. When necessary the liability to the subcontractor can be set up in determining the amount due, but it is set up not for the benefit of the subcontractor, but as showing part of the cost of performance by or damage on account of breach to the contractor. The question in cases of this class is, was the service called for by the contract performed, or was the contractor ready, able, and willing to perform it, not what subcontractors had performed or would have performed it.

But in this case no such situation exists. Travis had an interest in Weighel's contract with the Government; except for the fact that payments were made to Weighel, Travis was treated as contractor by the Government. Weighel had a contract with the Government and also a contract with Travis. The contract with Travis was fully performed and Travis had no claim against Weighel under it. This appears negatively, also positively by the fact that Travis paid to Weighel the difference between the Government contract and the subcontract, $2,400 per year (Finding I, Rec. 62). Weighel's contract with the Government was fully performed; he not only asserted no claim against the Government but refused to do so.

The real situation existing at the date of the completion of Weighel's contract with the Government (June 30, 1899, Finding I, Rec. 61) and prior to the filing of the petition signed for Weighel (Apr. 18, 1901) is shown by the following extracts from and exhibits attached to the substituted petition filed and verified by Travis on February 13, 1912 (Rec. 14, 22):

> That the payments for the service for so transporting the mails on said route 235001 for the said term were duly made by the United States to said William Weighel. That said Weighel paid to said Travis for said services the said annual sum of $70,000 as provided in said subcontract, and therefor paid him nothing more, and declined to bear any of the responsibility or expenses of any

of the said services set forth in the said petition; said Weighel further declined to have suit brought in his name for the alleged extra services as set forth, except upon the express condition that "any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis—and not otherwise." This authority, with the condition here stated, is in writing, duly acknowledged before a notary public, and a copy, as Exhibit 2, is attached hereto as a part of this substitute for the amended petition. The limitation of such authority is sought to be added to by the attorney of said Weighel, E. B. Young, in his letter to said Travis of November 14, 1899, transmitting the said written authorization of said Weighel, as follows: "This authority is sent you upon the conditions that you agree to hold and save harmless, Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government, and upon the further condition, as stated in the authority, that any such suit or suits must be at your sole cost, charge and expense." A copy of this letter is hereto attached as a part of this substitute for the amended petition. (Exhibit 3.)

That all the services alleged in the petition, to which this is an amendment, as having been extra and not provided for by the said contract between the United States and said Weighel, and not paid for by the United States, were performed by said Ezra J. Travis,

your petitioner herein, and by no other person, and that all the expenditure and cost made necessary by performing said alleged extra services, were duly and wholly borne by said Travis.

* * * * *

Exhibit 2 (p. 27).

Know all men by these presents, that W. Weighel, of the city and county of San Francisco, contractor on mail messenger, transfer, and mail station route number 235001, city of Chicago, and the performance of which service was sublet by the said W. Weighel to E. J. Travis for the period from July 1, 1895, to June 30, 1899, does hereby authorize and empower the said E. J. Travis to bring suit against the United States Government for the recovery of any money or moneys due for any service performed that is not embraced in the contract made between the said Weighel and the said United States Government for the said service during the said period of time, any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis and not otherwise.

As witness my hand and seal this 14th day of November, 1899.

(Signed) W. WEIGHEL.

* * * * *

Exhibit 3 (p. 28).

GORDON & YOUNG,
ATTORNEYS AND COUNSELLORS AT LAW,
14 SANSOME STREET,
*San Francisco, Cal.*
Rooms 6, 7, 8, and 9. Telephone 5098.

NOVEMBER 14, 1899.

E. J. TRAVIS, Esq.,
*525 East 15th Street, New York City.*

DEAR SIR: Enclosed please find authority from Mr. Weighel to bring suit for the performance of station service in connection with route number 235001 that was not a part of the contract. This authority is sent you upon the condition that you agree to hold and save harmless Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government and upon the further condition as stated in the authority that any such suit or suits must be at your sole cost, charge and expense. Be good enough to acknowledge receipt of this letter and your acceptance of the conditions upon which the authority is sent. If any other authority is needed kindly advise me.

Yours very truly,
(Signed) E. B. YOUNG.

Travis was the real party in interest so far as the extra services are concerned and should have brought suit in his own name within the statutory period. When he did file his petition it was dismissed on account of the bar of the statute of limitations, not

for want of any capacity to sue. His contract with Weighel was entered into with the knowledge and consent of the Government, and he was recognized and dealt with by the Government as subcontractor (Findings I and VI, Rec. 62, 63.) He openly declined to file his contract with the department and was not required to do so; the only effect of this was that he could not claim the lien provided by section 3 of the act of May 16, 1878, chapter 107, 20 Stat., 61, 62. This statute has no bearing whatever upon the right of Travis to sue. Section 2 of this act was complied with; the substituted petition specifically alleges (Rec. 19) that written permission of the Postmaster General was secured before the subcontract was executed; this allegation stands admitted by the demurrer. The law referred to on pages 20, 21 of appellant's brief is part of the act making appropriations for the Post Office Department for the fiscal year ending June 30, 1883 (ch. 116, act of May 4, 1882, 22 Stat., 52, 53, 54); it clearly has no application to this case, for no action was taken under it by the Postmaster General. The only law cited by appellant which is applicable was section 2 of the act of May 16, 1878, which, as shown above, was complied with; this alone would establish a relationship between Travis and the Government which would have entitled him to sue.

If it was at all possible for Travis to obtain permission or authority to bring suit in Weighel's name, the original suit was not so brought; it was signed

and verified "William Weighel by J. H. McGowan, attorney for petitioner." (Rec. 5.) This petition does not mention Travis's name or contract. Though prior to the bringing of the suit Weighel had "declined to bear any of the responsibility or expense of any of said services," and had declined to bring suit, and, in fact, all said services had been performed by Travis, this petition filed and verified in Weighel's name stated positively:

> That in pursuance of said several orders and under the terms of the said several protests your petitioner performed all of said additional service and made all the additional trips hereinbefore set forth, although such services were not within the terms of his contract aforesaid, and they were fairly and reasonably worth, over and above all just credits and offsets, the sums hereinafter set forth in your petitioner's bill of particulars, hereto attached as Exhibit "F" and made a part hereof; and your petitioner avers that said claim has not been assigned or transferred by him, and that all of said service was received and accepted by the United States, and by reason thereof there arises on the part of the United States an implied promise to pay your petitioner the reasonable worth of the same.

It was not until the substituted petition was filed by Travis that the actual facts appeared which showed that Weighel, by his own admissions, had absolutely no interest in this claim, and that the only person interested was Travis. The substituted petition was probably filed because it was realized

that Weighel, as petitioner, could not recover in his own right, never having performed any of the extra service and being under no responsibility whatever to answer to Travis for the same. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 407. It being apparent that Travis was the real owner of the claim the question arises as to how he acquired it. Certainly not by assignment; if he had it would be barred by section 3477, R. S., and section 3963, R. S. If not by assignment, then on account of his interest in the Weighel contract, his right to claim through Weighel, but this is specifically negatived by his own sworn statement, showing that there was absolutely no responsibility of Weighel to him on account of this extra work. Then, too, were this the case, Travis should have sued Weighel, or he should have sued in Weighel's name, so stating and showing the facts; but neither course was adopted. Instead a petition was filed by Weighel claiming as sole owner. The fact is that Travis was the real and only party in interest; that he acquired his interest, not by assignment from Weighel (Weighel never owned the claim), not under his contract with Weighel, for that was fully performed and settlement had between him and Weighel; but on account of extra services required from him by the Government, performed by him for the Government, and for which Weighel had expressly disclaimed any liability. It was therefore incumbent upon him to assert his claim by suit

within the statutory period; this he did not do and the Court of Claims rightly decided that he could not do so after that period had expired, nor can he, after the statute has run against him, prosecute an action and recover in the name of one who performed no services, has no liability on account of the same, contractual or otherwise, and who has refused to bring suit. This is what is sought to be done. After the substituted petition of Travis was dismissed on demurrer, the executor of Weighel was substituted as claimant in the original petition; thereupon an amended petition was filed by the executor, which again asserts the claim as that of Weighel and makes no mention of Travis or the Travis contract; probably because when Travis is brought into the case Weighel must go out, as there was no contractual relation between Weighel and Travis when the original petition was filed; no responsibility of Weighel to Travis; and when Travis is brought in it is conclusively shown that Weighel, or his executor, is asserting against the Government a claim in which he has no interest and on account of which he has no liability to anyone.

## II.

**The service required was provided for by the contract.**

The Court of Claims was of opinion that the service required under the orders in question was not provided for by the contract between Weighel and the United States, but that no cause of action arose in

favor of Weighel. The Government contends that the service was in fact provided for by the contract and that, consequently, no cause of action arose in favor of either Weighel or Travis.

The form of contract entered into by Weighel with the United States for the performance of regulation screen wagon service in Chicago, Ill., and the form and character of the general terms of the advertisement under which the proposal was submitted and the contract was made (R. pp. 38–43, 55–60) are identical in every essential particular with those of the contracts and advertisements for such wagon service that have for a number of years been presented to the Court of Claims and this court in questions as to whether service as required thereunder has or has not been provided for thereby. Therefore the decisions in the cases of this character are determinative of the rights of the parties in interest in this case. Where the same character of service has been involved these decisions have generally been in favor of the Government. The real claimant in this case, Travis, seeks to avoid the terms of the contract herein and the authority of such cases by claiming a warranty on the part of the Government by reason of certain information given to the agent of Weighel by the postmaster at Chicago to the effect that the contractor under the advertisement would not be required to perform this service in question.

43136—21—3

A.

**The terms of the contract and advertisement clearly cover the service required as new or additional or changed service and which the contractor was obliged to perform without additional compensation.**

The advertisement was issued inviting proposals for covered regulation mail messenger, transfer, and mail station service "for carrying the mails of the United States in the covered regulation wagons prescribed by the department, on the routes herein specified, being covered regulation wagon mail messenger, transfer, and mail station service in the cities hereinafter named, between the post offices and railroad stations, between the post offices and steamboat landings, between the post offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations, as prescribed herein," etc. (R. p. 38.)

The advertisement set forth schedules for mail messenger service, transfer service, and for mail station service, and also schedules for probable additional service, all of which pages are omitted from the printed record (R. p. 39), excepting one page showing the character of service required between the general post office and mail stations (R. p. 126).

Paragraph 2 of the advertisement provided as follows:

> The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1895,

> or at any time thereafter during the contract term, whether between post offices and railroad stations, between post offices and steamboat landings, between post offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations, now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding and must name the amount per annum for the whole service and not by the trip. (R. p. 39.)

The advertisement was by the terms of the contract made a part thereof.

The contract itself recited that Weighel had been accepted as contractor for transporting the mails on the route in question in Chicago, Illinois, under an advertisement issued by the Postmaster General, which advertisement was made by reference a part of the contract, and "for performing all new or additional service of said kinds which may at any time during the term of this contract be required in said city," for and during the term named therein. (R. p. 55.)

By stipulation first, of the contract, the contractor agreed to carry such mail, using therefor wagons of the kind therein described in sufficient number "to transport the whole of said mail, whatever may be its size, weight, or increase during the term of

this contract * * * ; and so to carry until said schedule is altered by the authority of the Postmaster General, as herein provided, and then to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet or other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail," etc. (R. p. 56.) The contract further provided as follows:

> Second. To take the mail from, and deliver it into, the postoffices, mail stations and cars at such points, and at such hours, under the directions of the postmaster at Chicago, Ill., approved by the Postmaster General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.
>
> Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at Chicago, Ill., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.
>
> * * * * *
>
> Tenth. To perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order at the city of Chicago, Ill., during the contract term, without additional compensation, whether caused by change of location of

postoffice, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.

* * * * *

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity. (R. pp. 56, 57, 58.)

At the time Weighel bid for the service the mails were not officially carried in the city of Chicago by the electric and cable cars. (Findings II, R. p. 62.)

After the service went into effect the Postmaster General authorized the carriage of mails on the street railways in Chicago and issued orders requiring the wagon contractor to perform service under his contract without additional pay in accordance with the terms of the contract between the general post office and the West Chicago Street Railway at

Chicago and Madison Streets, between the general post office and the North Chicago Street Railway at Clark and Monroe Streets, and between mail stations C, D, E, F, G, A, and B, and the contiguous points upon said West Chicago Street Railway and North Chicago Street Railway. (R. pp. 43, 44, 45.) Other orders were subsequently issued requiring like service between certain mail stations and street railways. (R. pp. 46, 47.)

The question here therefore is whether this required service was new or additional or changed service, as provided for by the terms of the advertisement and contract.

This service was "new, additional, or changed service," as provided for by paragraphs 2 and 3 of the instructions to bidders (R. p. 39), and "new or additional or changed service," of the "kind" described as provided for by paragraph tenth of the contract which the contractor agreed to perform without additional compensation. (R. pp. 57, 58.) The advertisement specifically required the performance of service between the general post office and the several mail stations and the only change that was made by these orders complained of was the requirement of the carriage of part of the mails theretofore carried between the general post office and the mail stations, thereafter between the general post office and the respective mail stations, and contiguous points on the street railways. This was the same kind of service as service contracted for and

was service between points properly designated under the terms of the advertisement and contract referred to.

Practically the same question arose in the cases of *Luther C. Slavens* v. *The United States* (38 Ct. Cls. 574) and *Samuel G. Proffit* v. *The United States* (42 Ct. Cls. 248). The cause of action in those cases arose about the same time as the cause arose in the case at bar and involved practically the same question of the duty of the wagon contractor to carry the mails to and from electric car lines upon which service had been established after the beginning of the wagon contract. An appeal in the *Slavens case* was taken to this Court and the judgment below was affirmed here. (196 U. S. 229.)

In the *Slavens case* practically the identical claims relied upon here were insisted upon by the plaintiff in that case. The facts there were that the Postmaster General established mail service on the street car lines in the cities of Boston, Brooklyn, and Omaha after Slavens, the contractor, had begun the performance of his contract, there never having been any such service in those cities previous thereto, and required Slavens to perform service between the post offices, postal stations, and railroad depots and such street car routes at street crossings. It was contended for the claimant in that case that the service was a totally different kind of service than that embraced in and contemplated by either the advertisement or contract. In the case at bar, where the facts are practically of the same nature, the Court of Claims,

contrary to its decision in the *Slavens case*, has stated that the service required herein was of an entirely different nature from that described in the contract. (Op. R. p. 65.) This view is contrary to the views expressed by this court through Mr. Justice Day in delivering the opinion in the *Slavens case*, where the following language upon this point is used:

> As to the other claim for extra services: In the stipulation of the contracts, it appears that the contractor was required to perform all new or additional or changed covered wagon mail station service that the Postmaster General should order, without additional compensation, whether caused by change of location of post office, stations or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary in the judgment of the Postmaster General from any cause, and that officer has the right to change the schedule, vary the routes, increase, decrease, or extend the service without change of pay. It is insisted that these stipulations, properly construed, permit the Postmaster General to require only additional service of the same kind as that stipulated for, and that the carrying of the mails from street cars, where the same might be ordered to be met at crossings, was a new and different kind of service, and was not a change caused by a different location of a post office, station, or landing within the meaning of the contract. But we think this is too narrow a construction of the terms of the agreement. Strictly speaking, the carry-

> ing of the mails from the street cars at the crossings is not taking them from the stations, but it practically amounts to the same thing. * * * But we think the services were within the contract, fairly construed, and do not entitle the contractor to extra compensation. (196 U. S. 236, 237.)

The same questions arose again in the *Proffit case*, *supra*, where the claimant, among other things, claimed that he was improperly required to perform service between street car lines on routes established after the contract was made. Some routes so established were entirely new, being established over the Capital Traction Company, Washington, over which there never had been any service authorized theretofore. The changes largely increased the miles of travel in Baltimore and decreased them in Washington. The Court of Claims held that the service was properly required, citing the *Slavens case* and differentiating the cases from the *Union Transfer case* (36 Ct. Cls. 216) and the *Utah-Nevada-California Stage Company case* (39 Ct. Cls. 420; 199 U. S. 414).

In the case at bar the Court of Claims found that at the time Weighel submitted his bid no mail service in the city of Chicago was being performed to or from street cars by contractors who were performing the same mail service which was bid for by Weighel. This finding does not differentiate the case at bar from the *Proffit case*. Substantially the same question arose in that case. The court found the facts in that case to be that at the time of the advertise-

ment there was no street collection service by the street railways of Baltimore, and the mail which was deposited in the boxes adjacent to the line of the railway was collected by letter carriers or collectors from the various city boxes and was brought by them and deposited in the city post office or branch post office, and from that point such mails were transported to certain designated stations by the street railway company, from whence the contractor was expected to carry them into the city post office. After the advertisement had been issued and the contract made, the system of collecting mail from the street letter boxes and other depositories by carriers and collectors, who were paid out of another appropriation, was changed, and postal car collection boxes were established on the streets; and postal collectors, who were attached to postal cars on the street railways, were detailed boxes, and the existing collectors, instead of carrying the mails collected by them to the post office as theretofore, delivered them to the street cars; and the claimant was required to meet the postal cars of the street railways at street crossings and transport the mail so collected by these various postal collectors to the city post office; all of which service became necessary by reason of the change of collection by letter carriers and collectors, which was in vogue at the time the advertisement was issued, and by the establishment of a new system of collection circuits by street car lines. (42 Ct. Cls. 252, 259.) The

court, in delivering its opinion, stated in regard to this point as follows:

> Subsequent to the advertisement and execution of the contract, the collection of mail from street letter boxes and substations by letter carriers and mail collectors, theretofore in vogue, was discontinued and this entire volume of mail was collected by means of postal-car collection boxes installed at various points along the line of the street railways, from which postal collectors attached to postal cars collected the same, and the street cars delivered it to the claimant at various street intersections where he was required to meet them and transport the mail to the general post office. (Finding IX.) It is to be observed, however, that the adtional service thus imposed upon the claimant was not different in kind and character from that embraced in the contract. The service differs in every respect from that heretofore declared extra by the court, in that the claimant was not required to visit the collection boxes and carry the mails directly therefrom to the general post office. He was, it is true, required to make many additional trips to and from the street cars and carry a much greater volume of mail to the general post office, but the service was clearly within the requirements of the covered regulation wagon mail-messenger transfer and mail station postal service as contemplated by the contract. (42 Ct. Cls. 248, 259.)

The court below found in the case at bar that the advertisement did not mention service to and from street cars, although the subsequent advertisement did mention specifically such service. (R. p. 62, Finding II.)

This fact is not determinative in favor of the claimant. The inauguration of service on the street cars in the large cities was under development at the time. A contention was made in the *Slavens* and *Proffit cases* that such a service could not be anticipated by the contractor. The report of the Second Assistant Postmaster General for 1899, showing the development of the mail service on the street railway lines during the few preceding years, cites the service of Boston, Mass.; Chicago, Ill.; Philadelphia, Pa.; St. Louis, Mo.; San Francisco, Calif.; and Washington, D. C., showing that any prospective bidder would have been fully advised upon proper inquiry of such gradual development and have taken into consideration the possiblities of such changes during his term of contract. In the case at bar it is specially relevant that the public had knowledge immediately preceding the beginning of the claimant's term of contract that the department was experimenting with the service in Chicago. In the annual report of the Postmaster General for the year ending June 30, 1894, on page 172, the following appears:

> Consideration is now being given to the feasibility of utilizing electric and other rapid motor street car lines to facilitate the transportation of mails in the important cities

between the main post offices and branch offices and to and from the railway stations. A plan of this kind would probably include the running of a special car over the several street lines for the exclusive use of the mail service, not only for carrying locked pouches but in which a certain amount of distribution would be possible. Of course such an arrangement could be effected only by the hearty cooperation of the street car companies with the department for the improvement of the service. This office hopes to accomplish some substantial results in the direction indicated within the next year.

In the annual report for the succeeding year, 1895, on page 165, appears the following:

Believing that the department had reached the time when the improved methods of handling mail in cities and in suburban districts had become a postal necessity, the question of utilizing electric and cable cars, as well as other suggested methods, was given very serious consideration and close study, resulting in certain experimental arrangements being made with some electric lines and cable companies in different cities with most satisfactory results. The experiments mentioned were tried first in St. Louis, next in Brooklyn, Boston, Philadelphia, Chicago, and New York.

* * *

In Chicago one car was utilized as an experiment and was found to be of so much service that additional lines were arranged for, which will practically take in at least one-half of the city as soon as cars can be built.

This same statement shows similar developments in Boston, Philadelphia, New York City, and Brooklyn. It was in connection with this same development in Boston, Brooklyn, and Omaha that the claim in the *Slavens case* arose. As hereinbefore stated, it is shown to have been substantially the same claim as that advanced in the case at bar. It was fully and exhaustively presented to this court and earlier to the Court of Claims, and decided in favor of the Government. It can not be said, therefore, that the contractor in this case was taken by surprise or misled as to the probabilities of the service to be performed any more than the contractor for the other cities named.

From the above, and a consideration of the authorities cited, it is clear that the service required was "new or additional or changed" service of the "kind" described and within the terms of its contract, and that the contractor was obliged to perform the same thereunder without additional compensation.

B.

**The statement of the postmaster at Chicago was not a warranty that the service would not be required.**

We may now consider appellant's claim that the statements made by the postmaster at Chicago to the agent of Weighel constituted a warranty and that the contractor would not be required to perform this service.

The finding on this point is that—

> The plaintiff's decedent, through his agent, was informed by the postmaster at Chicago,

> who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service * * * would not be required to perform mail service to and from street cars. (R. p. 62, Finding II.)

This representation was not binding upon the United States; the postmaster had not been authorized by the Postmaster General to make any such statement; it amounted to a representation directly contrary to the terms of the advertisement and the contract itself. (*Slavens* v. *United States*, 196 U. S. 229, 237, 238.)

The authority given the postmaster at Chicago is found in paragraph 27 of the instructions to bidders, as follows:

> Bidders are requested to use the blanks for proposals furnished by the department, which may be obtained at the post office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to apply to the postmaster at the city where the service is to be performed. (R. p. 43.)

This manifestly refers merely to information regarding the details of the service and the matters of requirement in connection therewith. There would be a number of these which would not be set out in the advertisement itself and would not be inconsistent with the terms of the advertisement, but which would be important for a bidder to know. The most

important of these items is the schedule indicating the hours of departure of wagons from various points. The advertisement itself merely states the number of trips between the points, but does not give the hours at which the wagons may be required to depart from the several points. Such information as this was contemplated by the paragraph in the advertisement.

A construction of this authority that the postmaster was thereby authorized to vary the terms of the advertisement and the contract itself is an unreasonable one. No such authority can be deduced from the language used or from the reason for its use. All the logic is against such a construction. It is unreasonable to contend that the Postmaster General issued an advertisement including a form of contract under which it was understood by the department that this kind of service could be required of a contractor and under which the courts have uniformly decided that such a service could be required, and in the advertisement give a subordinate officer, the postmaster at Chicago who merely had charge of the conduct of the service in his city, the right and authority to nullify those provisions and to agree with the prospective contractor that if he entered into contract under the advertisement the kind of service which was required in other cities under a similar advertisement and contract would not be required of him.

The appellant relies upon certain cases cited to support his contention of warranty, which are dissimilar in their essential facts from the facts in the case at bar.

*United States* v. *Utah-Nevada-California Stage Company* (199 U. S. 414), does not present similar facts. In that case the question was whether the contractor was required to perform service to and from four elevated railroad stations. The advertisement had specifically covered this class of service, but had stated the number of elevated stations to be served as two instead of four, which was the number in fact (p. 424).

The court held that the contractor had a right to presume that the Government knew how many stations were to be served; that the fact was peculiarly within its knowledge; and that it spoke with certainty in the advertisement. These elements clearly differentiate that case from the case at bar, where the advertisement and contract were amply broad to cover the service in question.

The cases of *Hollerbach* v. *The United States* (233 U. S. 165), *Christie* v. *The United States* (237 U. S. 234), *United States* v. *Spearin* (248 U. S. 132), and *United States* v. *Atlantic Dredging Company* (253 U. S. 1) have no application to this case, unless it can be held that the unauthorized statement of the postmaster at Chicago to Weighel's agent was a warranty to Travis.

C.

**The increased expense of service did not give the claimant a right of action.**

Appellant argues that the increase in the expense of conducting the service by reason of the Postmaster General's orders complained of excluded the

service from the contract obligations under the doctrine of the *Utah-Nevada-California Stage Company case.*

The facts in that case, upon which the claimant recovered, were, however, very different in their nature from those in the case at bar. In that case the Post Office Department established "a new postal department in the city of New York" which was decided to be, in effect, a duplication of the general city post office and vastly increased the wagon contractor's work, requiring service, as it did, to two general post offices instead of one which was in existence at the time of the advertisement. (199 U. S. 423, 424.) The court there said that the "limit of reasonable requirement under the new and additional service clause was exceeded and the service required can not be held to be within the terms of the contract."

The mere fact that the contractor's service is greatly increased by orders issued under the authority of the contract gives no right of action against the Government. This has been clearly settled in the cases that have come to this court. In the case of *Union Transfer Company* v. *The United States* (36 Ct. Cls. 216) the Post Office Department increased the number of "receiving stations" in Philadelphia, Pa., by the establishment of 17 additional, and increased the number of "branch post offices" by increasing the number from 4, existing at the time the contract was entered into, to 12, during

the contract period, thus greatly increasing the cost of performance of service. The court held that, while service to and from the "receiving stations" was not within the terms of the contract, the service to and from the "branch post offices" was "new or additional service" or service of the "kind" described in the contract, and, although it increased the cost of service greatly, the contractor, nevertheless, had been properly required to perform it without additional compensation.

CONCLUSION.

It is respectfully submitted that, under either theory of the case presented, the appellant should not recover; and the judgment of the Court of Claims dismissing his petition was correct and should be affirmed.

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